ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5114

In the

United States Court of Appeals for the District of Columbia Circuit

---

NAVY SEAL 1; NAVY SEAL 2; NAVY SEAL 3,
Plaintiffs-Appellees,

NAVY SEAL 4,
Plaintiff-Appellant

v.

LLOYD J. AUSTIN, III, in his official capacity as Secretary of the United States Department of Defense; CARLOS DEL TORO, in his official capacity as Secretary of the United States Navy; and ADMIRAL MICHAEL M. GILDAY, individually and in his official capacity as Chief of Naval Operations,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE COLLEEN KOLLAR-KOTELLY
CASE NO. 1:22-cv-00688-CKK

APPELLANT'S BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

Counsel for Plaintiff-Appellant

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
2020 PENNSYLVANIA AVENUE NW
SUITE 189
WASHINGTON, D.C. 20006
(646) 262-0500

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-Appellant Navy SEAL 4 hereby submits the following certificate pursuant to Circuit Rules 12 and 28(a)(1):

1. Parties and *Amici*.

The parties to this appeal are Plaintiff-Appellant Navy SEAL 4 and Defendants-Appellees Lloyd J. Austin, III, in his official capacity as Secretary of Defense; Carlos Del Toro, in his official capacity as Secretary of the Navy; and Admiral Michael M. Gilday, individually and in his official capacity as Chief of Naval Operations. Navy SEAL 1, Navy SEAL 2, and Navy SEAL 3 are plaintiffs before the district court but not parties to this appeal. No *amici* or intervenors appeared before the district court.

2. Ruling Under Review.

The ruling under review is the district court's order (Doc. No. 29) and opinion (Doc. No. 30), entered April 29, 2022, denying Navy SEAL 4's motion for a preliminary injunction. The opinion is not reported but is available at *Navy SEAL 1 v. Austin*, Civil Action No. 22-0688 (CKK), 2022 U.S. Dist. LEXIS 78494 (D.D.C. Apr. 29, 2022).

3. Related Cases.

This case has not previously been before this Court or any court other than the district court. A similar case, *Creaghan v. Austin*, is pending before this Court as No. 22-5135.

In addition to this case and *Creaghan*, both of which remain pending in the district court as well, two other cases raising similar issues are pending before the district court: *Church v. Biden* (No. 28-cv-2815) and *Knick v. Austin* (No. 22-cv-1267).

Additional cases raising similar issues are pending before other courts of appeals: *Navy SEALs v. Biden* (5th Cir. No. 22-10077), *Poffenbarger v. Kendall* (6th Cir. No. 22-3413), *Roth v. Austin* (8th Cir. No. 22-2058), *Dunn v. Austin* (9th Cir. No. 22-15286), *Short v. Berger* (9th Cir. No. 22-15755), *Robert v. Austin* (10th Cir. No. 22-1032), *Air Force Officer v. Austin* (11th Cir. No. 22-11200), and *Navy SEAL #1 v. Biden* (11th Cir. No. 22-10645).

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions

Statutes

Other

---

* Authorities on which we chiefly rely are marked with asterisks.

GLOSSARY OF TERMS

CNO	Chief of Naval Operations
CONUS	Continental United States
LCPO	Leading Chief Petty Officer
RFRA	Religious Freedom Restoration Act
SEAL	Sea, Air, Land
SO	Special Operator
SWCC	Special Warfare Combatant-Craft Crew

INTRODUCTION

Not all military decisions are alike. Some are within the competency of the judicial branch to review and some are not. For example, in August 2021, the Commander-in-Chief and top military officials decided to surrender perimeter security during an evacuation at Kabul's Hamid Karzai International Airport in Afghanistan to members of the Taliban, a terrorist organization that seeks to do harm to the interests of the United States, resulting in the needless deaths of thirteen American servicemembers and over a hundred civilians.[1] The courts have no business second-guessing this decision, regardless of how deadly or incompetent it may have been. Deference is owed to military commanders in such circumstances.

In comparison, if the Commander-in-Chief and top military officials decided that Roman Catholics are nondeployable because in their judgment, Catholics are more loyal to the Pope than to the Commander-in-Chief, no one would suggest that a court of law could not review such a decision as it plainly violates federal constitutional and statutory law even though it is a "deployment, assignment, [or] other operational decision." And the government's interest does not morph into a compelling interest that trumps the fundamental right to religious freedom the

[1] *See* RealClear Politics, "Biden's Afghanistan Debacle Looks Worse and Worse," https://www.realclearpolitics.com/articles/2022/02/11/bidens_afghanistan_debacle_looks_worse_and_worse_147181.html (last visited July 13, 2022).

larger the number of Catholics involved. That is, an "aggregate harm" argument is nonsense when it comes to the fundamental right to religious exercise. Such an argument devalues that right.

The challenge at issue here resembles more closely the latter decision rather than the former. In other words, contrary to the District Court's conclusion, this challenge does not "implicate[] professional military expertise well beyond the Court's ken." (*Compare* JA 369, R-30, Mem. Op. at 12). As such, the deference that the District Court gave to the executive branch does harm to our Constitution and the fundamental right to religious freedom protected by the First Amendment and the Religious Freedom Restoration Act ("RFRA").

Remarkably, in *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017), *rev'd sub nom*. *Doe v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019), this *same* District Court judge rejected the "military judgment" of the Commander-in Chief and other military leaders and preliminarily enjoined the restriction on the service of transgendered individuals in the military even though the case raised no RFRA issues and there is no constitutional right to being transgendered.

At the end of the day, "it is the 'duty of the judicial department . . . to say what the law is.'" *NLRB v. Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). This case provides no exception. And "military interests do not always trump other considerations, and [the Supreme Court has]

not held that they do." *Winter v. NRDC, Inc.*, 555 U.S. 7, 26 (2008); *see also Shanahan*, 755 F. App'x at 23 (suggesting that a "blanket ban" prohibiting the accession of transgender individuals into the military would be justiciable).

The U.S. Constitution grants authority to Congress to regulate the military. U.S. Const., art. I, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces."); *see also Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (acknowledging Congress' "plenary constitutional authority over the military").

Pursuant to its authority, Congress enacted RFRA (42 U.S.C. § 2000bb, *et seq*.) and made it expressly applicable to any "branch, department, agency, instrumentality, and official . . . of the United States," which unquestionably include military officials such as Defendants/Appellees ("Defendants"). 42 U.S.C. § 2000bb-2(1).

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA protects "any exercise of religion." *Id*. at §§ 2000bb-2(4), 2000cc-5(7)(A). To justify a substantial burden on the free exercise of religion under RFRA, the government must demonstrate that the challenged action is "(1) is in furtherance of a compelling governmental interest; and (2) is the

least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). In other words, the government must satisfy strict scrutiny.

As noted, there is no doubt that RFRA applies here. Accordingly, strict scrutiny applies to the challenge at issue. *Nothing less*. (*Contra* JA 373, R-30, Mem. Op. at 16 ["Whether and to what extent military judgements are nevertheless due some degree of deference under RFRA is a matter of some debate. The D.C. Circuit has yet to decide the issue."]). Congress provided no statutory exemption for the military, and it's not the role of this or any other court to create one.

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). "That standard 'is not watered down'; it 'really means what it says.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (internal citation omitted). And while this "most demanding test" applies here, the District Court applied something much less in "deference" to the military. Such "deference" does violence to religious freedom. It "violates the very document [these government officials] swore to support and defend." *See Air Force Officer v. Austin*, No. 5:22-cv-00009-TES, 2022 U.S. Dist. LEXIS 26660, at *34-35 (M.D. Ga. Feb. 15, 2022).

In the final analysis, Defendants do not challenge the fact that Plaintiff/Appellant Navy SEAL 4's ("Plaintiff") religious beliefs are sincerely held, nor do they challenge the fact that the vaccine mandate substantially burdens

Plaintiff's religious exercise. (*See* JA 78, 104-05, R-19-1, Navy SEAL 4 Decl. ¶ 28, Ex. D [CNO Denial]; *id*., ¶ 24, Ex. B [Chaplain Review]).

Accordingly, the principal issue for this Court to resolve is whether Defendants can satisfy strict scrutiny under the facts of *this case* as they relate to *this plaintiff*. Defendants cannot meet their "most demanding" burden. As noted below, because this case involves the violation of the right to religious freedom, the likelihood of success factor in the preliminary injunction analysis is dispositive.

In conclusion, Plaintiff satisfies the factors for granting a preliminary injunction. This Court should reverse the District Court and direct the entry of the requested injunction.

JURISDICTIONAL STATEMENT

On March 11, 2022, Plaintiffs Navy SEALS 1-4 filed their Complaint challenging the vaccine mandate on federal statutory and constitutional grounds. (JA 9, R-1 [Compl.]). The District Court has jurisdiction under 28 U.S.C. § 1331.

On March 25, 2022, Plaintiff Navy SEAL 4 filed a motion for preliminary injunction. (R-14 [Mot. for Prelim. Inj.]). Defendants opposed the motion. (R-22 [Resp. to Mot. for Prelim. Inj.]).

On April 29, 2022, the District Court issued an Order (JA 357, R-29 [Order]) and Memorandum Opinion (JA 358, R-30 [Mem. Op.]) denying the motion.

On May 1, 2022, Plaintiff Navy SEAL 4 timely filed a Notice of Interlocutory Appeal (JA 393; R-31 [Notice of Interlocutory Appeal]).

This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

STATEMENT OF THE ISSUE

Whether the District Court erred when it denied Plaintiff's request for a preliminary injunction.

STATEMENT OF PERTINENT AUTHORITIES

All relevant portions of any pertinent statute or regulation cited by Plaintiff are set forth in the body of this brief.

STATEMENT OF THE CASE

A. Procedural History.

On March 11, 2022, Plaintiffs Navy SEALS 1-4 filed their Complaint challenging the vaccine mandate on federal statutory (Religious Freedom Restoration Act) and constitutional grounds (First and Fifth Amendments). (JA 9, R-3 [Compl.]).

On March 17, 2022, Plaintiff Navy SEAL 4 was informed by his command that the Navy would be starting the process to separate him from active duty for "Commission of a Serious Offense" because he objects to the vaccine mandate on religious grounds. (JA 79, Navy SEAL 4 Decl. ¶ 32, R-19-1). Consequently, on March 25, 2022, Plaintiff Navy SEAL 4 filed a motion for preliminary injunction.

(R-14 [Mot. for Prelim. Inj.]). In the motion, Plaintiff Navy SEAL 4 requested that the District Court "enter a preliminary injunction enjoining Defendants from (1) enforcing against Navy SEAL 4 any order or regulation requiring COVID-19 vaccination and (2) from instituting or enforcing any adverse or retaliatory action against Navy SEAL 4 as a result of, arising from, or in conjunction with Navy SEAL 4's religious objection to the COVID-19 vaccination mandate, his request for a religious exemption from the vaccine mandate, or pursuing this action or any other action for relief under RFRA or the First and Fifth Amendments." (*Id*. at 2)

Defendants opposed the motion. (R-22 [Resp. to Mot. for Prelim. Inj.]).

On April 29, 2022, the District Court issued an Order (JA 357, R-29 [Order]) and Memorandum Opinion (JA 358, R-30 [Mem. Op.]) denying the motion. In its opinion, the District Court stated, in relevant part:

> The Motion raises particularly difficult questions that implicate a storm of colliding constitutional interests of exceptional public import. On the one hand, Plaintiff alleges a violation of a fundamental right guaranteed by the Constitution's Free Exercise Clause. On the other hand, the Commander-in-Chief Clause provides the military broadly unfettered authority to ensure military readiness and the health of the Armed Forces. The tension between these two competing interests is even further complicated by a relative dearth of precedent and everchanging, novel science on which the vaccine in question rests. With these challenges in mind, and after careful review of the pleadings, the relevant legal and historical authorities, and the entire record, Court shall **DENY** Plaintiff's [14] Motion for Preliminary Injunction.

(JA 358, R-30, Mem. Op. at 1). This timely appeal follows.

B. Statement of Facts.

Plaintiff is on active duty in the U.S. Navy and a member of the U.S. Navy Sea, Air, and Land Teams, commonly known as Navy SEALs. SEALs are the U.S. Navy's primary special operations force, and they are a component of the Naval Special Warfare Command. Plaintiff has served on active duty in the U.S. Navy for nearly 17 years, serving approximately 12 of those years as a Navy SEAL. He is currently assigned to the Naval Special Warfare Development Group, which is located in Virginia. (JA 72, R-19-1, Navy SEAL 4 Decl. ¶¶ 1-4).

As a Navy SEAL, Plaintiff has faced death and suffered many hardships defending our freedoms against enemies around the globe. He took an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic. Plaintiff remains willing to make the ultimate sacrifice in defense of our freedoms enshrined in the Bill of Rights. (JA 72-73, R-19-1, Navy SEAL 4 Decl. ¶ 5).

Plaintiff is extraordinarily fit. The physical demands of being a SEAL require him to be one of the most physically fit men in the country, if not the world. Consequently, Plaintiff belongs to a demographic that is the least susceptible to suffering any adverse consequences from COVID-19. However, he remains at risk of adverse and serious health consequences from the COVID-19 vaccines. (JA 73, R-19-1, Navy SEAL 4 Decl. ¶ 6; *see also* JA 59-66, 69, R-14-3,

McCullough Decl. ¶¶ 42-64, Op. ¶ 6 [opining based on his medical expertise and the scientific data that "the risks associated with the investigational COVID-19 vaccines, particularly for young healthy men such as Navy SEALs, outweigh any theoretical benefits, are not minor or unserious, and many of those risks are unknown or have not been adequately quantified nor has the duration of their consequences been evaluated" and that "the mandatory administration of COVID-19 vaccines creates an unethical, unreasonable, clinically unjustified, unsafe, and unnecessary risk to servicemembers"]).

Secretary of Defense Lloyd Austin announced on August 9, 2021, that COVID-19 vaccines would be added to the list of mandatory vaccines required for all service members "by no later than mid-September, or immediately upon [FDA] licensure, whichever comes first." Mem. for Dep't of Def. Employees (Aug. 9, 2021), https://perma.cc/H5G8-T62L. (JA 73, R-19-1, Navy SEAL 4 Decl. ¶ 7).

After the FDA announced its approval of Pfizer BioNTech's COVID-19 vaccine on August 23, 2021, Secretary Austin directed the "Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority or on active duty or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19." Mem. for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency and DoD Field Activity Directors (Aug. 24, 2021),

https://perma.cc/CV3JEM3M ("vaccine mandate"). (JA 73, R-19-1, Navy SEAL 4 Decl. ¶ 8).

Secretary Austin's directive indicates that "[m]andatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full licensure from the [FDA] in accordance with FDA-approved labeling and guidance," but also notes that service members "voluntarily immunized with a COVID-19 vaccine under FDA Emergency Use Authorization" are considered fully vaccinated. *Id*. A subsequent directive issued by the Secretary of the Navy required all "[a]ctive duty Sailors and Marines" to "become fully vaccinated by November 28, 2021." (JA 73-74, R-19-1, Navy SEAL 4 Decl. ¶ 9).

Failure to abide by the vaccine mandate can and will result in harsh and severe penalties, including criminal prosecution, loss of pay and benefits, removal from the Navy SEALs, and separation from the armed services. (JA 74, R-19-1, Navy SEAL 4 Decl. ¶ 10).

Plaintiff is a Christian, and he has sincerely held religious beliefs that prevent him from receiving any of the COVID-19 vaccines. Consequently, he objects to the vaccine mandate on religious grounds. Plaintiff explained his religious objection to the vaccine mandate in his request for a religious exemption that he submitted to his command. In summary, Plaintiff's personal convictions, which are the bases for his religious objection to the vaccine mandate, are inspired

by his study and understanding of the Bible and personally directed by the true and living God. Plaintiff is personally convicted that he should not receive any of the COVID-19 vaccines. He must comply with his convictions (James 4:17). If Plaintiff fails to submit to his personal convictions that the Holy Spirit and Scripture have impressed upon him, then he will be sinning against God. Accordingly, Plaintiff's objection to the vaccine mandate is based on his Christian faith and religious principle asserting a conscientious religious objection to the COVID-19 vaccines. (JA 74, R-19-1, Navy SEAL 4 Decl. ¶ 11).

Plaintiff was advised by his chain of command via a page 13 entry in his service record that "[u]nless medically or administratively exempt, any refusal to be vaccinated may constitute a Failure to Obey a Lawful Order and may be punishable under the Uniform Code of Military Justice (UCMJ) and/or administrative action for Failure to Obey a Lawful Order (UCMJ, Article 92)." Plaintiff was required to sign the page 13 counseling entry. Plaintiff was further advised via the page 13 entry of the following: "Additionally, per MANMED 15-105, special operations (SO) duty personnel (SEAL and SWCC) who refuse to receive the COVID-19 vaccine based solely on personal or religious beliefs will be disqualified from SO duty (unless the disqualification is separately waived by BUMED). This will affect deployment and special pays. This provision does not

pertain to medical contraindications or allergies to vaccine administration." (JA 74-75, 83, R-19-1, Navy SEAL 4 Decl. ¶¶ 12, 13, Ex. A [Page 13 Entry]).

As set forth in the page 13 entry, because Plaintiff is a "special operations (SO) duty personnel" who objects to the vaccine mandate on religious grounds, he will face punitive measures for exercising his religion, regardless of whether he is granted a religious exemption to the mandate. However, sailors, including SEALs, with a secular, medical objection will not face similar punishment. (JA 75, R-19-1, Navy SEAL 4 Decl. ¶ 14).

No Navy SEAL has died, let alone been hospitalized, by COVID-19 even though this virus has been with us for over two years. In contrast, Plaintiff is aware of many Navy SEALs who have died defending our freedoms against a hostile enemy and in training accidents. (JA 75, R-19-1, Navy SEAL 4 Decl. ¶ 15).

Plaintiff is aware of other Navy SEALs who have had COVID-19, and the symptoms have all been those similar to a weak case of the seasonal flu, with the most common symptom being a loss of smell or taste. Navy SEALs suffer far more injuries, some of which are disabling, from their routine and rigorous training than anything COVID-19 has caused. (JA 75, R-19-1, Navy SEAL 4 Decl. ¶ 16).

Plaintiff was infected with COVID-19, and he is fully recovered. Consequently, Plaintiff has natural immunity. (*See* JA 66-68, 69, R-14-3,

McCullough Decl. ¶¶ 65-70, Op. ¶ 3 [opining that "SARS-CoV-2 causes an infection in humans that results in robust, complete, and durable immunity for the wild type through Delta strains and is superior to vaccine immunity"]). Plaintiff's symptoms included a mild headache for 2 days and loss of smell for about 30 days. Having COVID did not prevent Plaintiff from performing his duties as a SEAL. (JA 75-76, R-19-1, Navy SEAL 4 Decl. ¶ 17).

For more than a year prior to the introduction of the COVID-19 vaccines and when the pandemic was in full force, Plaintiff and his command continued to execute mission requirements. They deployed, trained, and conducted operational and non-operational tasks worldwide, with minimum impact due to COVID-19. Consequently, during the pandemic and without the benefit of a vaccine, Plaintiff and his fellow SEALs traveled and conducted operations as well as exercises. In fact, they travelled outside of CONUS (the continental United States) on two occasions, and on six occasions they traveled out of the state for training. COVID-19 had no impact on Plaintiff's operational capabilities or his unit's operational capabilities. (JA 76, R-19-1, Navy SEAL 4 Decl. ¶¶ 18, 19).

During the pandemic, Plaintiff's command also instituted COVID-19 safety protocols, including a 14-day quarantine for those infected with the virus, mandatory reporting of symptoms or exposure, mask wearing in gathering places like the chow hall, utilizing the CRAM T (a metric to gauge exposure while on a

trip) when approving leave, and weekly testing of the unvaccinated. These protocols were apparently effective as no SEAL died or was hospitalized from COVID-19. (JA 76, R-19-1, Navy SEAL 4 Decl. ¶ 20).

On October 15, 2021, Plaintiff submitted his request for a religious exemption to the vaccine mandate. As part of the submission process, Plaintiff was interviewed by a Navy chaplain. As acknowledged by the Navy chaplain, Plaintiff's "request is based on his Christian faith and religious principle asserting a conscientious religious objection to the current COVID-19 vaccines. [Plaintiff's] faith convictions result from much study and prayer and are inspired through his biblical understanding." The chaplain concludes: "I believe [Plaintiff's] request to be sincere and is consistent with his religious faith. He holds a conviction to follow his faith in discerning truth from error. To go against his conscience would violate his covenantal commitment to God. I believe his request is based on a deeply held religious conviction. Further, he displays a manner of life and practice of faith that supports that belief." (JA 76-77, 85-99, R-19-1, Navy SEAL 4 Decl. ¶¶ 21-24, Ex. B [Religious Exemption Package]).

On or about October 18, 2021, Plaintiff's command recommended disapproval of his request for a religious exemption. On or about November 26, 2021, the reviewing authority (Deputy Chief of Naval Operations) disapproved Plaintiff's request. The denial contained the same boiler plate language used for

other Navy personnel even though they are in different commands with different assignments. (JA 77, 85-99, 101-102, R-19-1, Navy SEAL 4 Decl. ¶¶ 25, 26, Ex. B [Religious Exemption Package], Ex. C [Navy SEAL 3 Denial]).

On or about December 6, 2021, Plaintiff timely appealed the denial of his request for a religious exemption to the Chief of Naval Operations (CNO), who is the final decision maker for these requests. (JA 77-78, 85-99, R-19-1, Navy SEAL 4 Decl. ¶ 27, Ex. B [Religious Exemption Package]).

On February 15, 2022, Plaintiff was informed that the CNO denied his appeal on or about February 10, 2022. (JA 78, 104-05, 107, R-19-1, Navy SEAL 4 Decl. ¶¶ 28, 29, Ex. D [CNO Denial], Ex. E [Notice of CNO Denial]). Pursuant to the notice Plaintiff received, "The Chief of Naval Operations is the final adjudication [for Plaintiff's request for a religious exemption] and an appeal is no longer an option." Accordingly, Plaintiff was formally "ordered to initiate vaccination" and advised that "[f]ailure to comply with this order constitutes a violation of the Uniform Code of Military Justice." Plaintiff cannot comply with this order as doing so would violate his sincerely held religious beliefs. Plaintiff will not violate his sincerely held religious beliefs. Consequently, he will not comply with the vaccine mandate or this order compelling him to do so. As a Christian, it is more important for Plaintiff to protect his soul, which will live for

eternity, than it is to protect his physical body. (JA 78, 107, R-19-1, Navy SEAL 4 Decl. ¶ 29, Ex. E [Notice of CNO Denial]).

The Navy provides periodic COVID-19 updates on its official website. Per this update,

> As of March 16, 2022, active duty service members currently have *12 permanent medical exemptions*, *212 temporary medical exemptions*, *26 administrative exemptions*, and *zero religious accommodation requests* for the COVID-19 vaccine approved. There have been 3,316 active duty requests for a religious accommodation from immunization for the COVID-19 vaccine.

This information can be found at https://www.navy.mil/US-Navy-COVID-19-Updates/ (last visited Mar. 18, 2022) (emphasis added). (JA 78-79, R-19-1, Navy SEAL 4 Decl. ¶ 30).

On this same website, the Navy provides data regarding COVID-19 cases, hospitalizations, recovery, and deaths. As of March 18, 2022, the Navy reported 89,241 total cases, 2,150 active cases, 2 hospitalized, 87,074 recovered, and 17 deaths. *See* https://www.navy.mil/US-Navy-COVID-19-Updates/ (last visited Mar. 18, 2022). (JA 79, R-19-1, Navy SEAL 4 Decl. ¶ 31).

On March 17, 2022, Plaintiff was informed by his command that it would be starting the process to separate him from active duty for "Commission of a Serious Offense" because Plaintiff objects to the vaccine mandate on religious grounds. During a meeting with his commanding officer, Plaintiff was given an adverse performance evaluation report for "refusing the order to receive the COVID-19

vaccine." Plaintiff was also notified that he would be separated "by reason of Misconduct – Commission of a Serious Offense . . . [a]s evidenced by [his] refusal of the COVID-19 vaccination." (JA 79-80, 109-13, R-19-1, Navy SEAL 4 Decl. ¶ 32, Ex. F [Adverse Performance Eval. & Admin. Separation Processing Notice]).

Even though his performance evaluation report was adverse and he is not vaccinated, in this report, Plaintiff's command still recommended him for Team LCPO (Team Leader) and Advanced Training LCPO. (JA 80, R-19-1, Navy SEAL 4 Decl. ¶ 33).

The vast majority of Navy SEALs assigned to Plaintiff's command have been vaccinated. Consequently, his command could assign him to a team/unit with all vaccinated individuals. And if the vaccine is as effective as the government claims it is, then there should be no concerns about Plaintiff contracting the virus from these SEALs or spreading it to them. (JA 80, R-19-1, Navy SEAL 4 Decl. ¶ 34).

Because Plaintiff objects to the vaccine mandate on religious grounds, he has been designated as nondeployable and removed from his operational unit, the government is denying him travel and training opportunities, and he now must face an adverse and punitive separation process, having been accused by the government of the "Commission of a Serious Offense" for exercising his religion. Consequently, Defendants are now punishing Plaintiff for exercising his religion.

In other words, Defendants have already placed substantial burdens on Plaintiff's religious exercise. (JA 80, R-19-1, Navy SEAL 4 Decl. ¶ 35).

Moreover, despite having the burden of demonstrating a compelling interest and the lack of less restrictive means, Defendants failed to present evidence to refute Plaintiff's evidence demonstrating that (1) the pandemic is over; (2) the vaccines are ineffective as they were developed for now extinct variants of COVID-19; (3) natural immunity provides at least as good, if not better, protection from COVID-19 as any of the current vaccines; (4) Plaintiff belongs to the demographic that is the least susceptible to any bad outcomes caused by COVID-19, and this is evidenced by the fact that no Navy SEAL has suffered any adverse outcomes from having contracted COVID-19, including Plaintiff;[2] and (5) there are serious adverse health consequences caused by the COVID-19 vaccines to individuals such as Plaintiff. (*See* JA 49-69, R-14-3, McCullough Decl. ¶¶ 18-70, Op. ¶ 3, 4, 6). This last fact undermines any claim that granting medical exemptions is different because these exempt individuals could be harmed by getting the vaccine. Plaintiff has a better chance of being sidelined by an adverse reaction to the vaccine than being sidelined by a virus which he already had and from which he recovered. And he is certainly more likely to be sidelined by the

[2] (*See* JA 75-76, R-19-1, Navy SEAL 4 Decl. ¶¶ 15-19).

intense and dangerous training he undergoes on a regular basis as a Navy SEAL. (JA 75-76, R-19-1, Navy SEAL 4 Decl. ¶¶ 16, 17).

Moreover, pursuant to the Navy's own regulations, exemptions to vaccines are typically provided if there is "[e]vidence of immunity based on serologic tests, *documented infection*, or similar circumstances." (*See* JA 172, R-22-7, Defs. Ex 6, ¶ 6 [quoting BUMEDINST 62330.15B] [emphasis added]). Here (unfortunately), basic concepts of virology are discarded when it comes to the highly-politicized COVID-19 vaccine. Natural immunity has always been thought to be the best defense against a virus, as the Navy's own regulations confirm.[3] (*See also* JA 66-68, 69, R-14-3, McCullough Decl. ¶¶ 65-70, Op. ¶ 3).

Plaintiff wants to remain on active duty in the U.S. Navy, performing his operational duties as a Navy SEAL. He has worked hard to become a Navy SEAL. His past performance and his command's evaluations of his past performance have all been exemplary. Plaintiff is now being punished by the government because he wants to exercise his religious beliefs. And this punishment will carry over to the

[3] Defendants' medical expert could not refute the evidence supporting the efficacy of natural immunity. At best, the expert opined that "[d]ebate continues about whether natural immunity versus vaccine-induced immunity is more protective against breakthrough infections (a reinfection in someone who was previously infected versus an infection in a previously not infected individual who was fully immunized)." (JA 243-44, R-22-10, Defs.' Ex. 9, ¶ 30). Yet, as noted above, the Navy's medical regulations recognize the efficacy of natural immunity. In fact, it is an expressed basis for granting an exemption from vaccination. (*See* JA 172, R-22-7, Defs. Ex 6, ¶ 6 [quoting BUMEDINST 62330.15B]).

civilian sector as this adverse documentation and separation will deny him benefits and future employment opportunities. (JA 80, R-19-1, Navy SEAL 4 Decl. ¶ 36).

SUMMARY OF THE ARGUMENT

A preliminary injunction is appropriate in this case because (1) Plaintiff can demonstrate a substantial likelihood of success on the merits of his claims arising under RFRA (42 U.S.C. § 2000bb, *et seq*.), the Free Exercise Clause of the First Amendment, and the equal protection guarantee of the Fifth Amendment; (2) the momentary loss of religious freedom constitutes irreparable harm as a matter of law; (3) the balance of equities favors protecting religious freedom; and (4) it is always in the public interest to uphold fundamental rights.

In the final analysis, the resolution of this appeal turns on whether the District Court appropriately applied strict scrutiny. As argued here, upon this Court's *de novo* review of the lower court's application of this most demanding test known to constitutional law, the Court should reverse the District Court and remand for entry of the requested injunction.

STANDARD OF REVIEW

As stated by this Court,

> "'[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.'" 632 F.3d at 724 (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). We review the "district court's

> weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). We review the district court's legal conclusions *de novo* and its findings of fact for clear error.

Gordon v. Holder, 721 F.3d 638, 643-44 (D.C. Cir. 2013).

However, "[i]n First Amendment cases, the likelihood of success will often be the determinative factor in the preliminary injunction analysis." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (internal quotations and citation omitted); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'") (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). This principle of law applies to Plaintiff's RFRA claim as Congress, through RFRA, intended to bring Free Exercise Clause jurisprudence back to the test established prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See, e.g.,* 42 U.S.C. § 2000bb (enacting RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases *where free exercise of religion is substantially burdened*") (emphasis added). In other words, RFRA expressly protects the fundamental right to religious freedom guaranteed by the First Amendment as a matter of federal statutory law.

The reason why likelihood of success is the most important factor is because "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added); *see also Gordon*, 721 F.3d at 653 (stating that "[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes") (internal citation and quotations omitted). And the "enforcement of an unconstitutional law is *always* contrary to the public interest." *Id.* at 653 (emphasis added). There isn't a "military deference" exception, and this Court should not create one. Thus, once a likelihood of success is established in cases involving First Amendment freedoms, such as this one, it follows that the remainder of the preliminary injunction factors favor granting the injunction.

Moreover, whether Plaintiff is likely to succeed on the merits of his claims turns on whether the District Court properly applied the strict scrutiny standard, and the lower court's application of strict scrutiny is reviewed *de novo*. *Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George's Cty.*, 17 F.4th 497, 506 (4th Cir. 2021) (reviewing the district court's strict scrutiny application *de novo*); *Smith v. Univ. of Wash.*, 392 F.3d 367, 371 (9th Cir. 2004) ("A district court's conclusions regarding the sufficiency of the facts in meeting strict scrutiny

are reviewed *de novo*."); *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1288 (10th Cir. 2019) ("We review the application of strict scrutiny *de novo*.").

ARGUMENT

I. Plaintiff Satisfies the Standards for Granting the Injunction.

A. Plaintiff's Likelihood of Success on the Merits of His Claims.

1. RFRA.

Congress, through RFRA, intended to bring Free Exercise Clause jurisprudence back to the test established prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See, e.g.,* 42 U.S.C. § 2000bb (enacting RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened"). RFRA, which applies to any "branch, department, agency, instrumentality, and official . . . of the United States," plainly applies to Defendants. 42 U.S.C. § 2000bb-2(1).

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA protects "any exercise of religion." *Id*. at §§ 2000bb-2(4), 2000cc-5(7)(A). To justify a substantial burden on the free exercise of religion under RFRA, the government must demonstrate that the challenged action is "(1) is in furtherance of a compelling governmental interest; and (2) is the

least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). The government's burden is a heavy one.

RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000bb-2(4) (emphasis added). An "exercise of religion," in turn, is any "religiously motivated conduct," which includes the "performance of (or abstention from) physical acts . . . for religious reasons." *Employment Div. v. Smith*, 494 U.S. at 875, 877. This understanding of religious exercise has been established for at least the past fifty years. *See Sherbert*, 374 U.S. at 403 (describing religious exercise as "conduct prompted by religious principles"). And if there was any doubt about its scope, Congress explicitly stated that the "concept" of religious exercise must "'be construed in favor of a broad protection of religious exercise.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. § 2000cc-3(g)).

The Supreme Court has likewise recognized that religious exercise can take a variety of forms. In *Smith*, for example, the plaintiffs exercised their religion by ingesting hallucinogenic drugs. 494 U.S. at 874. In *Sherbert*, the plaintiff exercised her religion by refusing to work on a particular day of the week. 374 U.S. at 399-400. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), the plaintiffs exercised their religion by engaging in animal sacrifice. *Id*. at

524-25. And in *Holt v. Hobbs*, 574 U.S. 352 (2015), "the religious exercise at issue [wa]s the growing of a beard" and the refusal to shave it. *Id.* at 361.

Supreme Court cases also make clear that religious exercise can involve indirect actions. In *Thomas v. Review Board*, 450 U.S. 707, 715 (1981), the plaintiff exercised his religion by refusing to "participat[e] in the production of armaments" that might be used by others in war. In *United States v. Lee*, 455 U.S. 252, 257 (1982), the plaintiffs exercised their religion by refusing to "pay[] Social Security taxes" that they believed would "threaten" the social practice among the Amish of caring for each other without governmental assistance. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 179 (2012), the plaintiff was a school that exercised its religion by refusing to employ a teacher who had acted contrary to the tenets of its Lutheran "belief[s]." And in *Hobby Lobby*, the plaintiffs exercised their religion by refusing to provide their employees with health insurance that, if used by employees, might "result in the destruction of an embryo." 573 U.S. at 720.

Supreme Court cases have thus firmly established that all religious exercise must be treated equally. The law cannot treat some instances of religious exercise as more important, significant, or substantial than others, because "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Simply put, "the judicial process is

singularly ill equipped to resolve" how important or substantial a religious practice is. *Thomas*, 450 U.S. at 715-16. Such matters are "not within the judicial function [or] judicial competence," because "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. Accordingly, once a plaintiff draws a line between conduct that is "consistent with his religious beliefs" and conduct that is "morally objectionable," "it is not for [a court] to say that [his] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725.

Of course, courts can assess whether a person's asserted religious belief is "sincere" in order to "weed out insincere claims" that are simply a pretext to avoid complying with the law. *Hobby Lobby*, 573 U.S. at 717 n.28. As RFRA's legislative history explains, courts must be vigilant against "false religious claims that are actually attempts to gain special privileges." S. Rep. No. 111, 1993 U.S.C.C.A.N. at 1900. If a claim is "nonreligious in motivation," then it is not entitled to any protection. *Thomas*, 450 U.S. at 715. But where, as here, a claimant's sincerity is undisputed, courts must "accept" the claimant's view that a particular act or omission is "forbidden by [his] faith." *Lee*, 455 U.S. at 257.

It is equally clear that courts cannot second-guess religious objections that are based on a theory of moral complicity. If a religious adherent sincerely believes that he must abstain from a particular activity because it would make him morally complicit, then courts must defer to that belief. The reason is

straightforward: whether an act "is connected" to wrongdoing "in a way that is sufficient to make it immoral" is fundamentally a question of private religious belief. *Hobby Lobby*, 573 U.S. at 724. This question "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that" the person believes "has the effect of enabling or facilitating the commission of an immoral act by another." *Id*. Courts cannot "[a]rrogat[e] the authority to provide a binding national answer to this religious and philosophical question." *Id.* This follows directly from the principle that secular courts have no business questioning whether a religious believer has "correctly perceived the commands of [his own] faith." *Thomas*, 450 U.S. at 716.

At least three Supreme Court cases directly confirm that courts may not second-guess a plaintiff's sincere, complicity-based religious objection. In *Thomas*, the plaintiff had a religious objection to "participat[ing] in the production of armaments" that might be used by others in war. 450 U.S. at 715. Specifically, he objected to working directly on "tank turrets," even though he did not object to working in a "roll foundry" on "sheet steel" that "may have found its way into tanks or other weapons." *Id*. at 711 & n.3. The lower court dismissed his claim because it found his beliefs to be logically "inconsistent." *Id*. at 715. The Supreme Court rejected that reasoning, emphasizing that the plaintiff was entitled

to decide for himself which actions were "sufficiently insulated from producing weapons of war." *Id.* Once he "drew a line" as to which conduct he found religiously objectionable, a court could not "undertake to dissect [his] religious beliefs." *Id.* Because he had an "honest conviction that [certain] work was forbidden by his religion," his refusal to engage in such work was a protected exercise of religion. *Id*. at 716.

Similarly, in *Lee*, the Amish plaintiff objected to paying Social Security taxes because he believed that doing so would discourage other Amish from "provid[ing] for their fellow members the kind of assistance contemplated by the social security system." 455 U.S. 257. The Government disagreed, arguing that "payment of social security taxes w[ould] not," in fact, "threaten the integrity of the Amish religious belief or observance." *Id*. Once again, the Supreme Court rejected that argument, stating that "[i]t is not within the judicial function [or] competence . . . to determine whether [the plaintiff] or the Government has the proper interpretation of the Amish faith" as to whether paying Social Security taxes was religiously objectionable. *Id*. (citation and internal quotation marks omitted). Because the plaintiff *himself* believed that paying the taxes was religiously forbidden, his refusal to do so was an exercise of religion, and "compulsory participation in the social security system interfere[d] with [his] free exercise rights." *Id.*

Finally, in *Hobby Lobby*, the government's main argument was that "the connection between what the objecting parties must do (provide [contraceptive coverage]) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated" to support a cognizable religious objection. 573 U.S. at 723-24. The Supreme Court rejected that argument, noting that it "dodge[d] the question that RFRA presents" and instead sought to address a "question that the federal courts have no business addressing," namely, "whether the religious belief asserted in a RFRA case is reasonable." *Id.* at 724. Just as in *Thomas* and *Lee*, the relevant point was that the plaintiffs *themselves* believed that providing the mandated coverage would wrongfully "facilitat[e] the commission of an immoral act by another." *See id.* at 724-25. For that reason, their refusal to provide that coverage was a protected exercise of religion.

As the Navy chaplain who reviewed Plaintiff's request for religious exemption (a review mandated by the process put in place by Defendants) stated: "I believe [Plaintiff's] request to be sincere and is consistent with his religious faith." (JA 77, R-19-1, Navy SEAL 4 Decl. ¶ 24). And the CNO in his denial of Plaintiff's request for a religious exemption also did not question the sincerity of Plaintiff's religious beliefs. (JA 78, 104-05, R-19-1, Navy SEAL 4 Decl. ¶ 28, Ex. D [CNO Denial] ["I evaluated the request under the assumption that your religious beliefs are sincere . . . ."]). In sum, Plaintiff's religious exercise in this case is

clearly established, and the sincerity of his religious beliefs that form the bases for his religious exercise is not disputed. We turn now to the substantial-burden analysis.

The Supreme Court's substantial-burden analysis involves a straightforward, two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—*i.e.*, a substantial burden—on the plaintiff to abandon that exercise. *See, e.g.*, *Holt*, 574 U.S. at 360-61 (stating that the plaintiff "bore the initial burden" of (1) showing that the government policy at issue "implicates his religious exercise," and (2) showing that the "policy substantially burdened that exercise of religion").

As set forth above, Plaintiff has identified the religious exercise at issue by showing that the challenged mandate implicates his religious exercise. Plaintiff has also shown that the challenged mandate has placed substantial pressure—a substantial burden—on him to abandon that exercise. Here, by failing to comply with the vaccine mandate, Plaintiff is suffering and will continue to suffer adverse and harsh consequences, including, but not limited to, prosecution and criminal penalties, adverse disciplinary proceedings, damage to his reputation, discharge from the military, removal from special warfare operations, an adverse fitness report, loss of pay and benefits, loss of education and training opportunities, and loss of personal decorations and insignia, specifically including the Special

Warfare / SEAL Trident insignia. Even if a religious exemption were granted, Plaintiff will still suffer adverse consequences in that he will be removed from his hard-earned special operator status and sent to ordinary fleet duty. This is nothing more than a punitive measure intended to harm and shame Plaintiff for exercising his religion. Moreover, Plaintiff has already been formally accused by his command of engaging in the "Commission of a Serious Offense," and he is now subject to adverse disciplinary proceedings. This alone has stigmatized Plaintiff and harmed his reputation as an exemplary Navy SEAL.

Each of these adverse consequences/penalties imposes a substantial burden on Plaintiff's religious exercise. As Supreme Court precedent makes clear, the simple denial of unemployment benefits (*Thomas,* 450 U.S. at 717-18), the threat of "disciplinary action" (*Holt*, 574 U.S. at 358), and adverse economic incentives (*Hobby Lobby*, 573 U.S. at 722) all were sufficient for the Court to find a substantial burden. Plaintiff has thus demonstrated that the vaccine mandate substantially burdens his religious exercise. Indeed, Defendants do not appear to dispute this. As the CNO stated in his letter denying Plaintiff's request for a religious exemption: "I evaluated the request under the assumption that your religious beliefs *are sincere* and *would be substantially burdened*." (JA 78, 104-05, R-19-1, Navy SEAL 4 Decl. ¶ 28, Ex. D [CNO Denial]) (emphasis added).

As the vaccine mandate substantially burdens Plaintiff's exercise of religion, the "*burden is placed squarely on the Government*" to show that its mandate satisfies strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) (emphasis added). As the District Court tacitly (and perhaps unwittingly) acknowledged, Defendants did not meet that demanding standard in this case. (*See, e.g.,* JA 366, R-30, Mem. Op. at 9 [stating that the court was "concerned that the record as it currently stands does not properly resolve whether mandatory vaccination is the least restrictive means as to Plaintiff to accomplish the Government's interest in force readiness and national security more broadly"]).

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. It "requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That standard 'is not watered down'; it 'really means what it says.'" *Tandon*, 141 S. Ct. at 1297 (internal citation omitted).

Under strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden religion, it *must* do so." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (emphasis added). In *Fulton*, the Court held that Philadelphia's refusal to contract with Catholic Social Services for the provision of foster care services unless CSS agrees to certify same-sex couples as

foster parents violated the Free Exercise Clause of the First Amendment. The Court affirmed that "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. . . ." *Id*. at 1881 (internal citation omitted). The Court clarified that "[t]he question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies *generally*, *but whether it has such an interest in denying an exception to CSS*." *Id*. (emphasis added). Consequently, the question is not whether the government has a compelling interest in enforcing its vaccine mandate *generally*, *but whether it has such an interest in denying an exception to Plaintiff*.

Per the Supreme Court, "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye*, 508 U.S. at 547 (internal quotations and citation omitted). Here, Defendants permit medical and administrative exemptions. Yet, those who are *not* vaccinated because they have a medical (or administrative) exemption pose the same alleged risks as those who are not vaccinated because they object to the mandate on religious grounds. Moreover, Defendants allow those with a medical exemption to continue to operate as Navy SEALs. However, even if Plaintiff obtained a religious exemption, he would not be permitted to

continue as a Navy SEAL. Not only does this demonstrate overt discrimination against religious observers (*see infra*), it demonstrates that Defendants' alleged interests are not compelling. Reaching this legal conclusion does not require any court to become "a virologist, epidemiologist, immunologist, or even a medical doctor," as the District Court suggested. (JA 372, R-30, Mem. Op. at 15).

Moreover, Plaintiff has natural immunity to COVID, and this immunity provides protection at least as good (and likely better) than any mandated vaccine. (JA 66-68, 69, R-14-3, McCullough Decl. ¶¶ 65-70, Op. ¶ 3). The mandated vaccines are no longer effective (assuming they were even as effective as the government originally claimed them to be). (JA 49-59, 69, R-14-3, McCullough Decl. ¶¶ 18-41, Op. ¶ 4). And the risks of serious adverse consequences to Plaintiff caused by the injection of one of the COVID vaccines are far greater than the risks of any adverse consequences associated with contracting COVID. As the scientific research demonstrates: "the risks associated with the investigational COVID-19 vaccines, particularly for young healthy men such as Navy SEALs, outweigh any theoretical benefits, are not minor or unserious, and many of those risks are unknown or have not been adequately quantified nor has the duration of their consequences been evaluated . . . . [T]he mandatory administration of COVID-19 vaccines creates an unethical, unreasonable, clinically unjustified,

unsafe, and unnecessary risk to servicemembers." (JA 59-66, 69, R-14-3, McCullough Decl. ¶¶ 42-64, Op. ¶ 6).

Under RFRA, Defendants must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 573 U.S. at 726-27 (citation omitted). "[B]roadly formulated" or "sweeping" interests are inadequate. *O Centro*, 546 U.S. at 431; *Yoder*, 406 U.S. at 221. Rather, Defendants must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236. In other words, a court must "look to the marginal interest in enforcing the [vaccine] mandate in th[is] case[]." *Hobby Lobby*, 573 U.S. at 726-27. Here, Defendants cannot establish such a compelling interest for several reasons.

First, Defendants assert a purported "compelling governmental interest in preventing the spread of disease to support mission accomplishment, including military readiness, unit cohesion, good order and discipline, and health and safety, at the individual, unit, and organizational levels." (JA 78, 104-05, R-19-1, Navy SEAL 4 Decl. ¶ 28, Ex. D [CNO Denial]). But *Hobby Lobby* rejected these "very broadly framed" interests, noting that RFRA "contemplates a 'more focused' inquiry." *Id*. Indeed, "[b]y stating the public interests so generally, the

government guarantee[d] that the mandate will flunk the test." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

Second, "a law cannot be regarded as protecting an interest of the highest order" "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547 (citation omitted); *O Centro*, 546 U.S. at 433. Here, Defendants cannot claim an interest of the "highest order" when they grant administrative and medical exemptions, as noted above.

Finally, RFRA requires Defendants to identify a compelling need for enforcement against the "particular claimants" filing suit, not among a general population, such as all servicemembers. *Hobby Lobby*, 573 U.S. at 726-27. Defendants cannot make this showing. Defendants cannot show that enforcing the vaccine mandate against Plaintiff is "actually *necessary*" to achieve its aims. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (emphasis added). This is particularly true for at least the following eight reasons: (1) the pandemic is over; (2) the Navy has achieved a vaccine rate (99.4%) that protects its interests (accepting the government's claims regarding the efficacy of the COVID-19 vaccines); (3) those who are vaccinated can still become infected with and spread COVID-19; (4) Plaintiff has natural immunity, which is equivalent or superior to any immunity provided by the vaccines, and natural immunity is recognized as

effective protection under the Navy's own regulations (*see supra*); (5) effective therapeutics are available; (6) Plaintiff has operated (training and operations within and outside of CONUS) for many months as a Navy SEAL during a time when the pandemic was at its peak and when vaccines were not available, and these operations were not adversely affected by COVID-19; (7) there is a far greater risk of Plaintiff spraining or breaking his ankle during a routine training exercise (thereby sidelining him for a period of time) than there is a risk of him missing any operation or training due to COVID-19; and (8) Plaintiff could be assigned to a team/unit where everyone else is vaccinated, thereby minimizing (or eliminating, if the vaccine actually works) the risk of spread amongst members. (*See, e.g.,* JA 75-76, 80, R-19-1, Navy SEAL 4 Decl. ¶¶ 15-20, 34 at Ex. 1; *see also* JA 47-48, 50-51, 64-68, 68-69, R-14-3, McCullough Decl. ¶¶ 12, 13, 20-21, 56-70, Ops. ¶¶ 1-6).

As noted by the district court in *U.S. Navy Seals 1-26*:

> At least 99.4% of all active-duty Navy servicemembers have been vaccinated. . . . The remaining 0.6% is unlikely to undermine the Navy's efforts. Today, Plaintiffs present a lower risk of infection and transmission than in the earlier days of the pandemic. Several Plaintiffs have tested positive for antibodies, showing the presence of natural immunity. . . . With a 99.4% vaccination rate, the Navy's herd immunity is at an all-time high. COVID-19 treatments are becoming increasingly effective at reducing hospitalization and death.

U.S. Navy Seals 1-26, No. 4:21-cv-01236-O, 2022 U.S. Dist. LEXIS 2268 at *28-29 (N.D. Tex. Jan. 3, 2022) (internal citations omitted). The same is true here.

To be clear, Defendants' failure to "satisfy the Supreme Court's compelling interest standard[]" does not preclude this Court from "recogniz[ing] the importance of [the asserted] interests." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013). The fact that an interest is not compelling does not make it unimportant or insignificant—it merely means that it does not justify overriding the congressional concern for religious liberty embodied in RFRA (or the constitutional concern embodied in the First Amendment, *see infra*). In other words, the government's interests underpinning the vaccine mandate may be variously described as legitimate, substantial, perhaps even important, but they do not rank as *compelling*, and *that makes all the difference*.

Defendants must also show that the vaccine mandate is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that "exceptionally demanding" test, *Hobby Lobby*, 573 U.S. at 728, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (citation omitted). A regulation is the least restrictive means only if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Sherbert*, 374 U.S. at 407. This test is particularly demanding here, because

"RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 573 U.S. at 695 n.3 (citation omitted).

It bears emphasizing yet again that *Defendants* carry the burden of proof here. And Defendants cannot satisfy their burden through unsubstantiated statements. Rather, they must offer evidence—usually in the form of affidavits from government officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case. Indeed, such explanations must relate to the specific accommodation the plaintiff seeks; and where a plaintiff identifies acceptable less restrictive alternatives, *the government must demonstrate that it has considered and rejected the efficacy of those alternatives*. *See, e.g., Fisher v. Univ. of Tex.*, 570 U.S. 297, 311-15 (2013) (requiring a "serious, good faith consideration of workable [alternatives]") (citation omitted). In short, to prevail, Defendants must rely on *evidence* that the vaccine mandate is the *only* effective and feasible way to protect the health and safety of the military force. Defendants cannot remotely meet this burden, nor have they done so here. (JA 366, R-30, Mem. Op. at 9 [tacitly acknowledging that Defendants have not carried their burden to show that "mandatory vaccination is the least restrictive means as to Plaintiff to accomplish

the Government's interest"). As noted, Defendants ignore the effectiveness of natural immunity (even though the Navy's regulations, BUMEDINST 62330.15B, do not) as well as therapeutics, to name just two less restrictive measures. And they ignore the ineffectiveness of the vaccines. Indeed, if the vaccines are as effective as the government claims them to be at reducing spread and illness, then the fact that a minute fraction of Navy personnel (including Plaintiff, who is among the demographic that is least likely to succumb to any adverse consequences arising from COVID but part of the demographic that is most likely to suffer adverse consequences from the vaccine) are not vaccinated should not affect its asserted interests in any way that makes those interests compelling. And the fact that Defendants permit administrative and medical exemptions to the vaccine mandate is fatal to its compelling interest claim. *Church of Lukumi Babalu Aye*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). Moreover, Defendants entirely ignore the adverse and serious health consequences to the members of the military (including Plaintiff) *caused by the vaccines*. This further undermines Defendants' stated interests in forcing these largely experimental vaccines on young and healthy service members in the first instance.

Finally, Plaintiff's command effectively instituted COVID-19 safety protocols, including a 14-day quarantine for those infected with the virus, mandatory reporting of symptoms[4] or exposure, mask wearing in gathering places like the chow hall, utilizing the CRAM T (a metric to gauge exposure while on a trip) when approving leave, and weekly testing of the unvaccinated. These protocols, which are less restrictive alternatives to the vaccine mandate, were effective as no SEAL died or was hospitalized from COVID during the pandemic when vaccines were unavailable.

In the final analysis, Defendants cannot meet their burden under RFRA. The vaccine mandate is unlawful. The injunction should issue.

2. Free Exercise.

Fundamentally, the "exercise of religion" under the First Amendment embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940); *see McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."). Indeed, "[t]he principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 523.

[4] (*See* JA 68-69, R-14-3, McCullough Decl., Op. ¶ 2 [opining that "the epidemic spread of COVID-19, like all other respiratory viruses, notably influenza, is driven by symptomatic persons; asymptomatic spread is trivial and inconsequential"]).

As noted above, Plaintiff's religious objection to the vaccine mandate is religious exercise under RFRA and the First Amendment, and the direct punishment of Plaintiff for exercising his religion has and will continue to place a substantial burden on that religious exercise.

For similar reasons as to why the vaccine mandate violates RFRA, it also fails under the Free Exercise Clause. As noted, RFRA was a repudiation of the *Smith* decision. "*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton*, 141 S. Ct. at 1876. Consequently, any law that burdens religion and is *not* neutral and generally applicable is subject to strict scrutiny.

The Supreme Court's recent decision in *Fulton v. City of Philadelphia* provided much clarification as to which laws are generally applicable and which are not, and *Fulton* confirms that the vaccine mandate is not generally applicable, thereby triggering strict scrutiny. As stated by the Court, "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct *by providing a mechanism for individualized exemptions*." *Fulton*, 141 S. Ct. at 1877 (internal quotations, punctuation, and citations omitted) (emphasis added). The Court further stated that "[a] law also lacks general

applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

As noted by the Court:

> The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless *whether any exceptions have been given*, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude.

Fulton, 141 S. Ct. at 1879 (internal punction, quotations, and citation omitted) (emphasis added).

Here, there is a formal mechanism for granting exemptions to the vaccine mandate, and this mechanism invites the government to decide which reasons for not complying with the mandate are worthy of solicitude. Defendants permit administrative and medical exemptions to the vaccine mandate, thus rendering the mandate not generally applicable.

Additionally, medical exemptions are given *favored treatment* over religious exemptions, thus demonstrating that the mandate is also not neutral toward religion. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of Lukumi Babalu Aye*, 508 U.S. at 534; *see also id*. at 542-47 (invalidating city ordinances on free exercise grounds and concluding that the ordinances fail to prohibit nonreligious conduct that endangers the same governmental interests in a similar or greater degree than the religious conduct).

In *Church of the Lukumi Babalu Aye, Inc.*, the Supreme Court stated that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Id*. at 546. In *Lukumi*, the Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishment for "whoever . . . unnecessarily . . . kills any animal"—a facially neutral ordinance. *Id*. at 537. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals by members of the Santeria religion when the ordinance was not applied to secular killings:

> [B]ecause [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.*

Id. at 537-38 (emphasis added) (quotations and citations omitted).

As the Court noted, "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id*. at 546-47.

The lack of neutrality in the enforcement of the challenged mandate is demonstrated by at least two undisputed facts: (1) Defendants have granted administrative and medical exemptions but granted zero religious exemptions as of March 16, 2022, and (2) Defendants will punish Plaintiff for obtaining a religious exemption but will not so punish other similarly situated individuals who have a medical exemption. Pursuant to Defendants' enforcement of the challenged mandate, "special operations (SO) duty personnel (SEAL and SWCC) who refuse to receive the COVID-19 vaccine *based solely on personal or religious beliefs* will be *disqualified* from SO duty . . . . This will affect deployment and special pays. This provision does *not* pertain to medical contraindications or allergies to vaccine administration." (JA 75, 83, R-19-1, Navy SEAL 4 Decl. ¶ 13, Ex. A [Page 13 Entry] [emphasis added]).

Because the vaccine mandate is not a neutral law of general applicability it must survive strict scrutiny. As noted above, Defendants cannot meet their heavy burden in this case. The vaccine mandate violates the Free Exercise Clause of the First Amendment.

3. Equal Protection.

The Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2

(1975). Consequently, case law interpreting the Equal Protection Clause of the Fourteenth Amendment is applicable when reviewing an equal protection claim arising under the Fifth Amendment, as in this case.[5]

It is axiomatic that the constitutional guarantee of equal protection embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Skinner v. Okla.*, 316 U.S. 535, 541 (1942) ("The guaranty of equal protection of the laws is a pledge of the protection of equal laws.") (internal quotations and citation omitted). And this constitutional guarantee applies to administrative as well as legislative acts. *Raymond v. Chi. Union Traction Co*., 207 U.S. 20, 35-36 (1907).

The Supreme Court's equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Md.*, 366 U.S. 420, 425 (1961); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.").

Moreover, as noted by the Sixth Circuit sitting *en banc*, when the government treats an individual disparately "as compared to similarly situated

[5] This case involves an equal protection claim arising under the Fifth Amendment because Defendants are agents of the federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

persons and that such disparate treatment . . . *burdens a fundamental right*, targets a suspect class, or has no rational basis," such treatment violates the equal protection guarantee. *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 256 (6th Cir. 2015) (*en banc*) (internal quotations and citation omitted) (emphasis added). "In determining whether individuals are 'similarly situated,' *a court should not demand exact correlation*, but should instead seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal quotation marks omitted) (emphasis added). The District Court incorrectly concluded that "[s]ervicemembers granted a medical or administrative exemption are not similar in 'all relevant respects' to those seeking religious exemptions." (JA 387, R-30, Mem. Op. at 30). Defendants' claimed interest for the vaccine mandate is to prevent the spread of COVID-19 within the military force. Consequently, anyone who is not vaccinated undermines this interest. Thus, there is "relevant similarity" amongst these servicemembers.

In this case, similarly situated individuals are not treated the same, and the distinction is based on whether the individual has made a *religious* objection to the vaccine mandate. As noted above, Defendants have granted administrative and medical exemptions to the mandate but have granted zero religious exemptions as of March 16, 2022, and Defendants will punish Plaintiff for obtaining a religious exemption by removing him from his duties as a Navy SEAL, but they will not so

punish other similarly situated individuals who have a medical exemption. This disparate treatment burdens the fundamental right to religious exercise, thereby requiring Defendants to satisfy strict scrutiny, which they cannot as argued above. The vaccine mandate violates the equal protection guarantee of the Fifth Amendment.

B. Irreparable Harm to Plaintiff.

Plaintiff will be irreparably harmed without the injunction. Defendants' vaccine mandate imposes a substantial burden on Plaintiff's religious exercise—a fundamental right protected by RFRA and the First Amendment. It is well established in constitutional jurisprudence that "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (emphasis added). And this injury is sufficient to justify the requested injunctive relief. *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*); *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."); *Navy Seal 1 v. Austin*, No. 8:21-cv-2429-SDM-TGW, 2022 U.S. Dist. LEXIS 31640 at *63 (M.D. Fla. Feb. 18, 2022) ("Requiring

a service member either to follow a direct order contrary to a sincerely held religious belief or to face immediate processing for separation or other punishment undoubtedly causes irreparable harm."); *Air Force Officer v. Austin*, 2022 U.S. Dist. LEXIS 26660, at *32-33 ("[F]ocusing exclusively on financial harm misses the mark because the loss of First Amendment freedoms, even for minimal periods of time unquestionably constitutes irreparable injury. . . . Since Defendant Miller ultimately denied Plaintiff's religious accommodation request and essentially infringed upon the free exercise of her religion, Plaintiff has suffered an irreparable injury. . . . [T]he choice to adhere to her religious beliefs or modify her behavior to violate those beliefs suffices to trigger constitutional protection. . . . Thus, Plaintiff has satisfied the second element to obtain a preliminary injunction.") (internal punction, quotations, and citations omitted); *U.S. Navy Seals 1-26*, 2022 U.S. Dist. LEXIS 2268, at *35-36 ("The crisis of conscience imposed by the [vaccine] mandate is itself an irreparable harm. . . . 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' *Elrod*, 427 U.S. at 373 (plurality opinion). The same is true of RFRA. . . . Thus, any losses the Plaintiffs have suffered in connection with their religious accommodation requests sufficiently demonstrate irreparable injury. [T]he principle the Supreme Court articulated in *Elrod v. Burns* applies broadly, and the Fifth Circuit has acknowledged that any loss of First Amendment freedom satisfies

the irreparable injury requirement, even in the national security context. . . . Thus, the second requirement for injunctive relief has been satisfied.") (internal quotations and citations omitted).

As stated by this Court,

> "[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury *other than the threatened constitutional deprivation itself*." *Davis v. District of Columbia*, 158 F.3d 1342, 1346, 332 U.S. App. D.C. 436 (D.C. Cir. 1998). Thus, "[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, *a prospective violation of a constitutional right constitutes irreparable injury for these purposes*." *Id*. (internal citation omitted).

Gordon, 721 F.3d at 653 (emphasis added).

Accordingly, the irreparable harm to Plaintiff is the *depravation* of his *right to religious exercise* protected by federal statutory and constitutional law. It's not simply the loss of pay or benefits—these losses constitute part of the *burden* upon Plaintiff's religious exercise, thereby *triggering* the constitutional violation. Here, Plaintiff has been formally accused of the "Commission of a Serious Offense" (an injury to his reputation)[6] and is now facing adverse disciplinary proceedings for exercising his right to religious exercise. He has received an adverse performance

[6] *See generally Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) (acknowledging "reputational injury that derives directly from government action," noting that "[r]edress is possible in such a case because the damage to reputation is caused by the challenged action," and concluding that the equitable relief of a "declaratory judgment that the government's actions were unlawful will consequently provide meaningful relief").

evaluation for exercising his right to religious exercise. He will be removed from the Navy SEALs for exercising his right to religious exercise. He is declared "nondeployable" for exercising his right to religious exercise. He cannot travel as part of his duties for exercising his right to religious exercise. And he will lose pay and benefits for exercising his right to religious exercise. These are all *substantial burdens* on Plaintiff's religious exercise, but the deprivation of his right to religious exercise caused by these burdens "*constitutes* [the] *irreparable injury*" warranting the requested injunction. *See supra*.

The District Court's conclusion that these *burdens* on religious exercise are reparable misses the point and is wrong as a matter of law. (JA 388-91, R-30, Mem. Op. at 31-34; *see also* JA 390, *id*. at 33 ["A likelihood of success on Plaintiff's RFRA claim will not do, however, as RFRA provides only a statutory right."]). As noted, the irreparable harm *is caused by the substantial burden placed on Plaintiff's religious exercise* under the First Amendment *and* RFRA. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[A]lthough the plaintiff s free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily. . . . Courts have persuasively found that irreparable harm

accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA."). The District Court is wrong as a matter of law.

In sum, Plaintiff has been punished for exercising his right to religious exercise, and this punishment will continue and increase in its severity absent the requested injunction. The irreparable harm to Plaintiff is clearly established.[7] *Elrod*, 427 U.S. at 373.

C. Harm to Others.

The likelihood of harm to Plaintiff is substantial because Plaintiff seeks to protect a fundamental liberty interest—the right to religious exercise. *See supra*. On the other hand, if Defendants are restrained from enforcing the vaccine mandate against Plaintiff, they will suffer no harm because the exercise of a protected right can never harm any of Defendants' or others' legitimate interests. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)

[7] It is wrong to assert that there is no irreparable harm in this case because there might be some future administrative remedy to recoup lost pay or benefits. Such an assertion misapprehends irreparable harm caused by the deprivation of a First Amendment right, *see supra*, and it presupposes, incorrectly, that RFRA has an exhaustion requirement. *See, e.g., Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) ("Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA's application or any exhaustion requirement, as it did, for example, in RFRA's 'sister statute,' the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq.*; *see also Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("We decline . . . to read an exhaustion requirement into RFRA where the statute contains no such condition, . . . and the Supreme Court has not imposed one.").

("[B]ecause the questions of harm to the parties and the public interest generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is, and will be in this case, whether the statute at issue is likely to be found constitutional."); *Pursuing Am.'s Greatness,* 831 F.3d at 511 (stating that "in this case, the FEC's harm and the public interest are one and the same, because the government's interest *is* the public interest" and emphasizing that "*there is always a strong public interest in the exercise of* [*First Amendment*] *rights otherwise abridged by an unconstitutional regulation* and, without a preliminary injunction, PAG is unable to exercise those rights during this election cycle") (emphasis added).

Additionally, the Navy has achieved a 99.4% vaccine rate. Plaintiff has had COVID-19 and recovered with no issues. Consequently, Plaintiff has natural immunity, which provides at least as much protection against COVID-19 as the vaccines. There are numerous less restrictive means to promote force protection short of mandating that Plaintiff get vaccinated in violation of his sincerely held religious beliefs. These include recognizing natural immunity, the availability of therapeutics, and implementing safety protocols, among others. And by granting administrative and medical exemptions, the vaccine mandate does not promote a

governmental interest "of the highest order." *Church of Lukumi Babalu Aye*, 508 U.S. at 547.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiff shows that his constitutional and federal rights have been violated (which he has shown here), then the harm to others is inconsequential.

D. The Public Interest.

The impact of the preliminary injunction on the public interest turns in large part on whether the vaccine mandate violates Plaintiff's right to free exercise. As this Court observed, "[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon*, 721 F.3d at 653; *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As set forth above, the vaccine mandate violates Plaintiff's religious exercise. Therefore, it is in the public interest to issue the injunction.

Additionally, without the injunction, Defendants (and our nation) will be losing a well-trained, veteran warfighter during a time when the world is now a far less safe place, particularly in light of Russia's invasion of Ukraine, China's aggressive actions toward Taiwan, and many other geopolitical threats. The public is best served by having veteran warfighters like Plaintiff serving in defense of our nation. And the public is best served by having "a military force strong enough to respect and protect its service members' constitutional and statutory religious rights." *Air Force Officer*, 2022 U.S. Dist. LEXIS 26660, at *35.

CONCLUSION

The Court should reverse the District Court and remand the case with instructions to grant Plaintiff's motion and enter a preliminary injunction enjoining Defendants from (1) enforcing against Plaintiff any order or regulation requiring COVID-19 vaccination and (2) from instituting or enforcing any adverse or retaliatory action against Plaintiff as a result of, arising from, or in conjunction with Plaintiff's religious objection to the COVID-19 vaccination mandate, his request for a religious exemption from the vaccine mandate, or pursuing this action or any other action for relief under RFRA or the First and Fifth Amendments.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)
2020 Pennsylvania Avenue NW, Suite 189
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,965 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Plaintiff-Appellant